SIXTH DIVISION
December 20, 2013

No. 1-12-1081

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 10 CR 21512
	)	
DEMORROW STEPHENS,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justice Hall and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for the uncharged offense of armed robbery committed with a dangerous weapon other than a firearm is vacated where the charged offense was not a lesser included offense of armed robbery committed with a firearm. The defendant's conviction and sentence are vacated, a judgment of conviction on the lesser included offense of robbery is entered, and the case is remanded for sentencing on the conviction. In addition, defendant's fees, fines and costs order is corrected to reflect a $200 DNA analysis fee is vacated and the $30 Children's Advocacy center fine is offset by credit for defendant's presentencing time served.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant Demorrow Stephens (Stephens) was convicted of armed robbery (720 ILCS 5/18-2(a)(1) (West 2010)) and sentenced to 10 years in the Illinois Department of Corrections. On appeal, Stephens argues: (1)

he was denied due process of law where he was convicted of an uncharged offense which was not a lesser-included offense of the charged offense; (2) he was denied effective assistance of trial counsel, who failed to challenge his conviction on the uncharged offense as improper; (3) the evidence was insufficient to convict him; (4) his sentence was excessive; and (5) his DNA fee should be vacated and he should be credited $30 against his fines for time spent in presentence custody. For the following reasons, the conviction and sentence are vacated, a judgment of conviction on the lesser included offense of robbery is entered, and the case is remanded for sentencing on the conviction. In addition, Stephens's fees, fines and costs order is corrected to reflect a $200 DNA analysis fee is vacated and the $30 Children's Advocacy center fine is offset by credit for Stephens's presentencing time served.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. On November 25, 2010, Stephens was arrested by the Chicago police on the charge of armed robbery with a firearm. On December 9, 2010, Stephens was charged by information with one count of armed robbery and one count of aggravated unlawful restraint. In particular, count 1 of the information alleged Stephens committed armed robbery:

> "in that HE, KNOWINGLY TOOK PROPERTY, TO WIT: UNITED STATES CURRENCY, FROM THE PERSON OR PRESENCE OF ISMAIL OBEIDALLAH, BY THE USE OF FORCE OR BY THREATENING THE IMMINENT USE OF FORCE AND HE CARRIED ON OR ABOUT HIS PERSON OR WAS OTHERWISE ARMED WITH A FIREARM,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 18-2(A)(2) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED."

¶ 5 The bench trial commenced on January 19, 2012. Mustafa Alkhatib (Alkhatib) testified that on November 24, 2010, at approximately 8:30 p.m., he was working in a small food store located at 5858 Augusta Boulevard with his business partner Ishmael Obeidallian (Obeidallian), and an employee, whom he identified as "Mr. Jones." There were no customers in the store.

¶ 6 As they were closing the store for the evening, someone entered the store carrying a handgun. The man, approximately 6' 2" in height, was wearing a black hoodie, a hat[1], and a mask covering his mouth and the lower portion of his nose. The man pointed a silver revolver at Obeidallian and said, "Give me the money or I blow your head." As the man spoke, the mask slipped down and Alkhatib recognized the man as a long-time customer of the store. Alkhatib testified he had observed the man in the vicinity of the store over the course of 10 or 11 years and in the store on approximately 100 occasions. Alkhatib also testified he believed the revolver was real because he observed a "bullet in the place where you put bullets."

¶ 7 Alkhatib observed the man with the weapon receive money from the cash drawer from Obeidallian. The man ordered them to not move, then exited from the store. Alkhatib identified Stephens in court as the man with the revolver. Obeidallian telephoned the police, who arrived 20 minutes later. Alkhatib informed the police he knew the robber and provided a physical description.

[1] The testimony does not establish whether the hat was worn over or under the hoodie.

¶ 8 On November 25, 2010, Alkhatib and Obeidallian drove around the neighborhood, looking for the perpetrator. Alkhatib and Obeidallian observed Stephens standing outside a house, wearing a red jacket and knit hat. Alkhatib telephoned the police, described Stephens and informed them of his current location. Alkhatib and Obeidallian returned to the store. Shortly thereafter, two police officers arrived at the store, escorting a suspect wearing a red jacket. Alkhatib and Obeidallian advised the police the suspect was not the robber. The officers exited the store, but returned 10 minutes later, escorting Stephens, who was still wearing a red jacket. Alkhatib identified Stephens as the robber. On November 26, 2010, Alkhatib also identified Stephens in a police lineup.

¶ 9 Obeidallian also testified regarding the robbery and subsequent search for the robber, providing a substantially similar account to Alkhatib's testimony. Obeidallian added he tendered to Stephens between $150 and $200 during the incident. In addition, Obeidallian testified his store's video surveillance equipment was not working at the time of the robbery, but he viewed the surveillance video from a store down the street and used his telephone to photograph an image of the robber from the monitor. Obeidallian informed the police of the existence of this surveillance video, but never viewed it again. Obeidallian also displayed the photograph to the police after they initially brought the wrong suspect to the store. Obeidallian identified Stephens at the store, in a police lineup, and in court.

¶ 10 Jones Howard (Howard) testified he was working at the store in the evening of November 24, 2010, when a "[g]uy bust in, with a pistol." According to Howard, the man had cinched his hood tightly to conceal his face, but the hood eventually slipped down, allowing Howard to

identify the man as a customer. Howard did not see the man wearing a hat, or a scarf or bandana around his face. Howard testified the man ordered him and a customer to lie down in the rear of the store and Howard complied. Howard identified Stephens as the robber in a police lineup and in court.

¶ 11 The State rested its case. Stephens moved for a directed finding. The trial judge denied the motion, but stated he "could not at this point in the light most favorable to the State determine that it is alleged the Defendant held in his hand was anything other than a bludgeon. Especially in the manner in which it was displayed to the victims." Observing the gun was never recovered, the trial judge added, "I cannot find beyond a reasonable doubt it was a gun, a firearm. But it was definitely a bludgeon, one that would still in this Court's view make [Stephens] guilty of the offense of armed robbery." Stephens rested his case without presenting evidence on his behalf. The trial judge then found Stephens guilty of armed robbery, "[n]ot with a firearm, but with a bludgeon, something that was proved beyond a reasonable doubt."

¶ 12 On January 30, 2012, Stephens filed a posttrial motion to reconsider and set aside the verdict, challenging the sufficiency of the evidence. On February 21, 2012, the trial judge denied the posttrial motion and proceeded to a sentencing hearing. Following a consideration of the factors in aggravation and mitigation of the offense, the trial judge sentenced Stephens to 10 years in prison, with 454 days of credit for time served in presentence custody. The trial judge also imposed $550 in fines and fees, including a $30 Children's Advocacy center fine and a $200 DNA testing fee. On February 24, 2012, Stephens filed a motion to reconsider his sentence, arguing the sentence was excessive. On March 21, 2012, the trial judge denied the motion to

reconsider the sentence. On March 28, 2012, Stephens filed a timely notice of appeal to this court.

¶ 13 DISCUSSION

¶ 14 On appeal, Stephens argues: (1) he was denied due process of law where he was convicted of an uncharged offense which was not a lesser-included offense of the charged offense; (2) he was denied effective assistance of trial counsel, who failed to challenge his conviction on the uncharged offense as improper; (3) the evidence was insufficient to convict him; (4) his sentence was excessive; and (5) his DNA fee should be vacated and he should be credited $30 against his fines for time spent in presentence custody. We need only address the first and final issues, as they are determinative of the appeal.

¶ 15 Stephens argues his conviction for armed robbery based on a dangerous weapon cannot stand where the offense was neither charged in the indictment nor a lesser-included offense of armed robbery based on a firearm as charged in Count 1. The State initially responds Stephens has forfeited this claim by failing to object to the trial court's finding of guilt and failing to include the putative error in his posttrial motion. Stephens concedes the issue was not preserved for review but requests this court to review the issue as plain error.

¶ 16 In general, failure to raise an issue at trial in a posttrial motion forfeits the issue on appeal. *E.g.*, *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Illinois Supreme Court Rule 615(a) creates an exception to the forfeiture rule by allowing courts of review to note "[p]lain errors or defects affecting substantial rights." Under Illinois' plain error doctrine, a reviewing court may consider a forfeited claim when:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the strength of the evidence.' " *Johnson*, 238 Ill. 2d at 484 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

The plain error doctrine is intended to ensure a defendant receives a fair trial, but it does not guarantee every defendant a perfect trial. *Johnson*, 238 Ill. 2d at 484. Rather than operating as a general savings clause, it is construed as a narrow and limited exception to the typical forfeiture rule applicable to unpreserved claims. *Id.* The burden of persuasion rests with the defendant under both prongs of the plain error analysis. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010). The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law reviewed *de novo*. *Johnson*, 238 Ill. 2d at 485.

¶ 17 Generally, the first step of plain-error review is to determine whether any error occurred. *Thompson*, 238 Ill. 2d at 613. "A defendant in a criminal prosecution has a fundamental due process right to notice of the charges brought against him." *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). "For this reason, a defendant may not be convicted of an offense he has not been charged with committing." *Id.* In appropriate cases, however, a defendant is entitled to have the judge or jury consider offenses "included" in the charged offense. *People v. Meor*, 233 Ill. 2d 465, 469 (2009). A defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument and the evidence adduced at trial

rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *Kolton*, 219 Ill. 2d at 360 (citing *People v. Novak*, 163 Ill. 2d 93, 108 (1994)).

¶ 18 "An 'included offense' is defined by statute as an offense which 'is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged.' " *Meor*, 233 Ill. 2d at 469-70 (quoting 720 ILCS 5/2-9(a) (West 2004)). In determining whether an offense is an included offense we employ the charging instrument approach. See *People v. Kennebrew*, 2013 IL 113998, ¶ 32.

> "Under the charging instrument approach ***, the lesser offense need not be a 'necessary' part of the greater offense, but the facts alleged in the charging instrument must contain a 'broad foundation' or 'main outline' of the lesser offense. *People v. Miller*, 238 Ill. 2d [161,] 166 [(2010)]; *People v. Kolton*, 219 Ill. 2d at 361; *People v. Novak*, 163 Ill. 2d [93,] 107 [(1994)]. 'The indictment need not explicitly state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations.' *People v. Miller*, 238 Ill. 2d at 166-67. There are two steps to the charging instrument approach. First, the court determines whether the offense is a lesser-included offense. Next, the court examines the evidence at trial to determine whether the evidence was sufficient to uphold a conviction on the lesser offense. *People v. Kolton*, 219 Ill. 2d at 361." *Kennebrew*, 2013 IL 113998, ¶ 32.

In addition, "[t]he rule is settled that the lesser-included offense doctrine 'does not apply where the two offenses in a particular case involve the same issues of disputed fact.' " *Meor*, 233 Ill. 2d

at 471 (quoting *People v. Cramer*, 85 Ill. 2d 92, 98 (1981)).

¶ 19 Stephens relies on *People v. Barnett*, 2011 IL App (3d) 090721, which held that a charge of robbery while armed with a dangerous weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2008)) was not a lesser-included offense of robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2008)). The *Barnett* court observed robbery while armed with a dangerous weapon "other than a firearm" and robbery while "armed with a firearm" are mutually exclusive, do not contain the same elements and, thus, the offense of robbery while armed with a dangerous weapon "other than a firearm" cannot be a lesser included offense of robbery while armed "with a firearm." *Barnett*, 2011 IL App (3d) 090721, ¶ 38. The *Barnett* court further observed that, had the State elected to charge the defendant with violations of both section 18-2(a)(1) (dangerous weapon other than a firearm) and section 18-2(a)(2) (while armed with a firearm), the conviction for armed robbery would have been affirmed. *Barnett*, 2011 IL App (3d) 090721, ¶ 34.

¶ 20 The State responds *Barnett* "does not accurately reflect the law on this issue" in light of the Illinois Supreme Court's decision in *People v. Washington*, 2012 IL 107993. Although the decision is not precisely on point, an examination of the case is instructive.

¶ 21 In *Washington*, the State alleged in the indictment Washington committed armed robbery and other offenses " 'while armed with a dangerous weapon, to wit: a firearm, in violation of Chapter 720, Act 5, Section 18-2(a) *** of the Illinois Compiled Statutes 1992, as amended.' " *Id*. at ¶ 5. The Illinois Supreme Court noted the armed robbery statute and the other relevant statutes were amended effective January 1, 2000, pursuant to Public Act 91-404:

"Prior to their amendment, the statutes provided that a person committed the offenses of

> armed robbery, aggravated kidnapping and aggravated vehicular hijacking if, at the time of the offense, he 'carried on or about his person or otherwise was armed with a dangerous weapon.' The term 'dangerous weapon' was not statutorily defined. The amended versions of the statutes altered this scheme by creating substantively distinct offenses based on whether the offenses were committed with a dangerous weapon 'other than a firearm' or committed with a 'firearm.' Public Act 91-404 also provided a definition of the term 'firearm' (see 720 ILCS 5/2-7.5 (West 2000) ("Except as otherwise provided in a specific Section, 'firearm' has the meaning ascribed to it in Section 1.1 of the Firearm Owners Identification Card Act." (430 ILCS 65/1.1))) and for those offenses committed with a 'firearm,' as defined by statute, there were sentencing enhancements, commonly referred to as the 15-20-25-to-life sentencing provisions, which the court was required to impose based on whether a firearm was in the offender's possession, discharged, or used to cause bodily harm. 720 ILCS 5/10–2(a)(5) through (a)(7), 18-2(a)(1) through (a)(4), 18-4(a)(3) through (a)(6) (West 2000)." *Id*. at ¶ 6.

Although Washington committed the charged offenses in 2004, the State indicted him using the "preamended" versions of the statutes because the sentencing enhancements in the amended versions had been declared unconstitutional by the Illinois Supreme Court. *Id*. at ¶ 7. Although Washington's trial took place in 2006, by which time the enhanced sentencing provisions originally in the amended versions of the statutes had come back into effect, the prosecution proceeded in accordance with the indictment and Washington raised no objection to the State proceeding in this manner. *Id*. at ¶ 8.

¶ 22 At trial, the victim testified Washington forced him at gunpoint into the victim's delivery truck, and ultimately into the back cargo area of the truck. *Id*. at ¶¶ 10-11. After the State presented its evidence, defense counsel moved for a directed finding on all counts, arguing the State charged a firearm was used, but failed to prove a firearm was used. *Id*. at ¶ 15. The trial court denied the motion and proceeded to a jury instruction conference, in which the trial judge denied a defense request for an instruction on the definition of a firearm. *Id*. at ¶ 16. The State conceded there was no evidence the weapon was recovered, but argued the instruction would confuse the jury. *Id*. The trial judge denied the requested instruction, observing Washington was charged with armed robbery with a dangerous weapon, which included not only a firearm, but also a "bludgeon or something else." *Id*. During deliberations, the jury requested the trial court define a "dangerous weapon," but the trial judge responded, without objection, "No, you have been given all your instructions, continue to deliberate." *Id*. at ¶ 21. Subsequently, the jury returned a verdict, finding Washington guilty of all of the charged offenses. *Id*.

¶ 23 On appeal, this court, after citing the charges as set forth in the indictment, considered whether the State presented sufficient evidence defendant committed the offenses while armed with a dangerous weapon, concluded the evidence was insufficient, and remanded the cause to the circuit court with instructions that judgment and sentences be entered on the lesser-included offenses of kidnaping, vehicular hijacking, and robbery. *Id*. at ¶ 25. The Illinois Supreme Court reversed this court. *Id*. at ¶ 44. Our supreme court first ruled the uncontradicted testimony of the victim, who was abducted in broad daylight and had an unobstructed view of the weapon, was sufficient to convict. *Id*. at ¶¶ 35-37. The *Washington* court also ruled there was no fatal

variance between the indictment, which alleged he used a "dangerous weapon, to wit: a firearm," and the proof at trial. *Id*. at ¶¶ 40-41.

¶ 24 In this case, relying on *Washington*, the State similarly argues "there is no fatal variance warranting reversal where the indictment charges that the offense is committed with a 'firearm' and the evidence shows that the offense is committed with a 'dangerous weapon' that is a firearm." Washington, however, was charged under the "preamended" version of the armed robbery statute, which referred only to being armed with a "dangerous weapon," a term not defined by statute at the time. *Id*. at ¶ 7. In contrast, *Barnett* addresses the current version of the statute, which distinguishes between being "armed with a dangerous weapon other than a firearm" and being "armed with a firearm." *Barnett*, 2011 IL App (3d) 090721, ¶ 32. The *Washington* court acknowledged these provisions of the statute, as amended, are now substantively distinct. *Washington*, 2012 IL 107993, ¶ 6. Thus, the State's argument that Stephens was adequately apprised of the charge against him where he was indicted for armed robbery with a firearm under section 18(a)(2) of the statute (and with no general reference to a "dangerous weapon"), but convicted of armed robbery with a dangerous weapon other than a firearm under section 18-2(a)(1), fails.

¶ 25 The State also argues *Barnett* is distinguishable from this case. In particular, the State maintains the problem in *Barnett* was the jury inconsistently found "the allegation that during the commission of the offense of armed robbery the Defendant or one for whose conduct he is legally responsible was armed with a firearm was not proven." *Barnett*, 2011 IL App (3d) 090721, ¶ 16. Yet the record on appeal establishes the trial judge made precisely the same

finding in this case. The difference between *Barnett* and this case is the trial judge here entered a conviction on the uncharged offense, which *Barnett* establishes is not a lesser included offense of armed robbery with a firearm. The difference is only in the nature of the error, not in the existence of the error. See *Kolton*, 219 Ill. 2d at 359.

¶ 26 The State further relies upon *People v. Garcia*, 188 Ill. 2d 265, 282 (1999), in which the Illinois Supreme Court held "that, under appropriate circumstances, a trial court possesses the discretion to instruct a jury *sua sponte* on lesser-included offenses, even where the State does not request such instruction and the defendant objects." In this case, however, the offense of robbery while armed with dangerous weapon "other than a firearm" cannot be a lesser included offense of robbery while armed "with a firearm." *Barnett*, 2011 IL App (3d) 090721, ¶ 38. As our supreme court has observed, the lesser-included offense doctrine does not apply where the two offenses in a particular case involve the same issues of disputed fact. *Meor*, 233 Ill. 2d at 471. Moreover, any missing element must be capable of being reasonably inferred from the indictment allegations. *Miller*, 238 Ill. 2d at 166-67. In this case, the weapon is either a firearm or a dangerous weapon other than a firearm. The missing element of a dangerous weapon other than a firearm cannot be reasonably inferred from an indictment which refers solely to armed robbery with a firearm. Accordingly, the trial judge here could not consider *sua sponte* whether Stephens committed armed robbery with a dangerous weapon other than a firearm. Thus, we conclude the trial court erred in convicting Stephens on the uncharged offense.

¶ 27 Given this conclusion, we must consider whether Stephens has satisfied either prong of the plain-error analysis. Stephens argues the second prong was violated in his case. In order to

succeed under the second prong of the plain error analysis, a defendant "must demonstrate not only that a clear or obvious error occurred [citation], but [also] that the error was a structural error." *People v. Eppinger*, 2013 IL 114121, ¶ 19 (citing *Thompson*, 238 Ill. 2d at 613-14). A structural error is "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Thompson*, 238 Ill. 2d at 614 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)).

¶ 28 As previously noted, "[a] defendant in a criminal prosecution has a fundamental due process right to notice of the charges brought against him." *Kolton*, 219 Ill. 2d at 359. Accordingly, conviction of a crime which is neither charged nor the lesser-included offense of a charged offense affects the integrity of the judicial process. *People v. McDonald*, 321 Ill. App. 3d 470, 472 (2001). Moreover, in both *Washington* and *Barnett*, the Illinois Supreme Court and this court, respectively, addressed related issues despite the defendants' failures to adequately preserve the issue under the traditional rules of forfeiture. See *Washington*, 2012 IL 107993, ¶ 39; *Barnett*, 2011 IL App (3d) 090721, ¶ 28. Thus, we conclude Stephens has established his conviction for armed robbery was the result of plain error in this case.

¶ 29 In the alternative, the State argues Stephens invited the error. The doctrine of invited error prohibits a defendant from requesting to proceed in one manner and then later contending on appeal the course of action was in error. *People v. Carter*, 208 Ill. 2d 309, 319 (2003). A defendant's invitation or agreement to a procedure later challenged on appeal may go beyond mere forfeiture of an objection on appeal. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). "The rule of invited error or acquiescence is a procedural default sometimes described as estoppel." *In*

re Detention of Swope, 213 Ill. 2d 210, 217 (2004). "Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented. The rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *Id*.

¶ 30 In this case, Stephens and his trial counsel did not object to the trial court finding the State failed to prove Stephens used a firearm beyond a reasonable doubt or the trial court's statement that use of a bludgeon would sustain a conviction for armed robbery. Stephens and his trial counsel did not request the trial court to proceed in any particular manner or acquiesce in any particular court procedure. Expanding the doctrine of invited error to encompass the defense's mere failure to object to a court's findings and rulings would effectively overwhelm the traditional rules of forfeiture. Accordingly, we conclude Stephens and his trial counsel did not invite the trial court's error.[2]

¶ 31 Having found Stephens's conviction cannot stand, Stephens requests this court to exercise its authority under Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967) to reduce his conviction to the lesser included offense of robbery (720 ILCS 5/18-1 (West 2010)) and remand the cause to the trial court for sentencing. Rule 615(b)(3) allows the appellate court to reduce the offense of which a defendant is convicted to a lesser offense where the reduced offense is a lesser included offense of the charged offense. *People v. Kennebrew*, 2013 IL 113998, ¶ 21. The State

[2] Given this conclusion, this court is not required to address the alternate claim on appeal that Stephens received ineffective assistance of trial counsel.

requests this court to reduce his conviction to one of armed robbery with a dangerous weapon other than a firearm. For the reasons already stated, armed robbery with a dangerous weapon other than a firearm is not a lesser included offense of the charged offense. In contrast, robbery is a lesser included offense to armed robbery. *People v. Elliott*, 299 Ill. App. 3d 766, 778 (1998); see *People v. Ross*, 229 Ill. 2d 255, 276 (2008). We therefore exercise our authority to reduce the conviction from armed robbery to robbery, vacate the sentence imposed for armed robbery, and remand the matter for sentencing on the robbery conviction.

¶ 32 Given the disposition of this case, we need not consider whether the State failed to prove Stephens guilty beyond a reasonable doubt of armed robbery with a dangerous weapon other than a firearm.

¶ 33 Lastly, Stephens argues – and the State agrees – that Stephens was entitled to $5 credit for each of the 454 days Stephens served in presentence custody, $30 of which is to be applied toward the Children's Advocacy center fine. See, *e.g.*, *People v. Jones*, 397 Ill. App. 651, 660-61 (2009). The State also agrees with Stephens that the $200 DNA testing fee should be vacated pursuant to *People v. Marshall*, 242 Ill. 2d 285, 302 (2011), because Stephens's DNA sample has already been collected. The State further concedes this court, in the interest of efficiency and judicial economy, may, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), modify the fees, fines and costs order. Accordingly, we order Stephens's fees, fines and costs order be corrected to reflect the $200 DNA analysis fee is vacated and the $30 Children's Advocacy center fine is offset by credit for Stephens's presentencing time served.

¶ 34 CONCLUSION

¶ 35 For all of the aforementioned reasons, the judgment of the circuit court, finding the defendant guilty of armed robbery, is vacated and judgment of conviction on the charge of robbery (720 ILCS 5/18-1 (West 2010)) is entered. The cause is remanded to the circuit court for sentencing on the robbery conviction.

¶ 36 Conviction vacated, new conviction entered, and remanded for sentencing.